No. 10048

United States Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED TIMBER COMPANY, a corporation
Appellant
vs.
IVAN WOMACK
Appellee

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Appellant
vs.
CONSOLIDATED TIMBER COMPANY, a corporation
Appellee

Upon Appeal from the United States District Court
for the District of Oregon

BRIEF OF APPELLANT CONSOLIDATED TIMBER COMPANY

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JURISDICTION

This is an action to recover wages and penalty alleged to be due appellee from appellant under the provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 28 U. S. C. A. Secs. 201-219). It was

commenced by the appellee, as plaintiff, filing a summons and complaint in the District Court of the United States for the District of Oregon (Tr. p. 2).

The District Court of the United States for the District of Oregon had jurisdiction of this cause under the provisions of Section 17 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 28 U. S. C. A. Sec. 381). The issues of fact and law were tried and determined by the court sitting without a jury, no jury having been demanded by either party, and the court thereupon made and entered its findings of fact and conclusions of law and decree (Tr. pp. 72, 82).

This court has jurisdiction to review by appeal the judgment of the District Court under the provisions of Section 128 of the Judicial Code as amended (28 U. S. C. A. Sec. 225). This case is not one in which a direct review may be had in the Supreme Court of the United States under the provisions of Section 238 of the Judicial Code as amended (28 U. S. C. A. Sec. 245).

STATUTES INVOLVED

The only statute here involved is the Fair Labor Standards Act of 1938.

STATEMENT OF THE CASE

This case presents for decision two principal questions:

1. Whether employees employed by a company engaged in the business of logging are "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 where said employees are employed to assist in preparing and serving food and to do other similar tasks in and about the cookhouse or restaurant which is owned and operated by said company.

2. If such employees are held to be engaged "in the production of goods for commerce" within the meaning of said Act, are they exempt under Section 13 (a) (2) of said Act as employees engaged "in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce"?

The cross-appeal raises precisely the same question with respect to a cookhouse of the non-isolated type.

Many logging companies on the West Coast maintain cookhouses, which is logging terminology for restaurants. These cookhouses are open to the general public. Employees of the logging companies are not required to use the cookhouse facilities. These cookhouses are operated on a nonprofit basis, that is, the charge made for meals served is fixed so as to cover only the cost thereof. Cookhouses of logging companies may be broadly classed into two types; the

first, cookhouses situated in a settled community where other facilities for eating are immediately available and, second, cookhouses isolated from settled communities and other established restaurants or eating places. This case involves both types.

The court below held that employees employed in both types of cookhouses were engaged in the production of goods for commerce within the meaning of Section 7 (a) of the Fair Labor Standards Act, but that employees of the cookhouse located in a settled community were exempt under Section 13 (a) (2) of the Act, while employees in the isolated type were not exempt under Section 13 (a) (2) of the Act.

For the convenience of the court, and by agreement between the parties, both types of cookhouses will be discussed in this brief.

A subsidiary question to be considered on the appeal is the effect to be given to certain Interpretative Bulletins issued from time to time by the Administrator of the Wage and Hour Division of the Department of Labor, who is charged with the enforcement of the Fair Labor Standards Act.

STATEMENT OF FACTS

Appellant Consolidated Timber Company carries on extensive logging operations in northwestern Oregon.

All logs produced by appellant are sold and delivered in the State of Oregon, but about 20 per cent ultimately go to sawmills in the State of Washington (Tr. p. 73). Appellant's headquarters is located in the town or village of Glenwood, Oregon, where it maintained an office building, machine shop, car house, several other buildings, and the cookhouse involved in the cross-appeal (Tr. p. 96). This cookhouse consisted of a kitchen and dining room in a building separate and apart from the other buildings of appellant. Appellant's employees were permitted, but not required, to use the facilities of the cookhouse. Meals were sold to them at fixed rates and the cost thereof was deducted from their wages. The cookhouse was also used by employees of logging companies under contract with appellant, by employees of some of the independent companies operated at Glenwood, and by members of the public. The greater proportion of appellant's employees did not use the facilities of the cookhouse. For example, during a typical month in which appellant employed 302 persons, 217 men regularly used the cookhouse at Glenwood, but of these only 110 were employees of appellant (including 18 cookhouse employees), 101 were employees of logging companies under contract with appellant and 6 were employees of independent businesses not connected with appel-

lant. During the same typical month, 302 meals were served to strangers and 192, or 60 per cent of the employees of appellant, did not use these cookhouse facilities at all (Tr. pp. 74, 75). Most employees ate at their homes, either at Glenwood or in the surrounding towns (Tr. pp. 96, 97). There was an independently owned hot dog or sandwich place at Glenwood (Tr. p. 95). Since the complaint was filed appellant has discontinued operating the cookhouse, and has leased it to an independent contractor, who is now operating it (Tr. p. 99).

The cookhouse at Camp 2 was located approximately 17 miles southwest of Glenwood on appellant's logging railroad. It consisted of a kitchen and dining room in a building separate and apart from other buildings of appellant. The facilities of this cookhouse are used by substantially all of appellant's employees at Camp 2. No employees are required to eat there and some employees occasionally go back to Glenwood, 17 miles away, for their meals. There is another independently owned cookhouse about two miles from Camp 2, to which anyone at Camp 2 could go, but there was no evidence that anyone had (Tr. p. 100). The cookhouse at Camp 2 is also used by employees of contractors of appellant and by the few

members of the public who come to Camp 2 (Tr. p. 75).

Appellee and the assignors of appellee worked at Glenwood and later at Camp 2. They were employed as baker, dishwasher, helper and second cook in both cookhouses (Tr. pp. 76, 77). These employees were paid by the month and worked more than the maximum hours prescribed by the Act.

No controversy is presented to this court, either by this appeal or by the cross-appeal, with respect to the hours worked by appellee and his assignors or as to the amount of overtime due them under the Fair Labor Standards Act, if it be found applicable to them.

SPECIFICATION OF ERRORS

I.

Employees in logging camp cookhouses are not engaged in the production of goods for commerce within the meaning of Section 7 (a) of the Fair Labor Standards Act, and the District Court therefore erred in making its Conclusion of Law No. 1 that such work constituted production of goods for commerce within the meaning of said section.

II.

A logging camp cookhouse located at an isolated point is a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, and the District Court therefore erred in making its Conclusion of Law No. 2 that the employees in such a cookhouse are not engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

III.*

If the cookhouse at Glenwood is a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, then the District Court did not err in finding that the employees of the cookhouse at Glenwood were exempt under the provisions of Section 13 (a) (2) of said Fair Labor Standards Act.

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*NOTE: This point is raised by the Statement of Points filed by the appellee on the cross-appeal, is not a specification of error on the part of the appellant, and is technically the specification of error of appellee on the cross-appeal.

ARGUMENT

I.

Employees in a logging camp cookhouse are not engaged in the production of goods for commerce within the meaning of Section 7 (a) (2) of the Fair Labor Standards Act.

The Fair Labor Standards Act applies to employees and not to employers—that is, the test in this and in any other case arising under the Act is whether the employee, and not the employer, is engaged in commerce or the production of goods for commerce. The language of Sections 6 and 7 of the Act is clear and its meaning unequivocal. The language is

> "(a) Every employer shall pay to each of his employees who is engaged in . . . production . . ."

and

> "(a) No employer shall . . . employ any of his employees who is (are) engaged in . . . production . . ."

The question here is whether appellee and the assignors of appellee were engaged in commerce or in the production of goods for commerce within the meaning of the Act.

The answer to the foregoing question therefore depends upon the interpretation and application of the

definition of "produced" as set forth in Section 3 (j) of the Act. This section defines "produced" as meaning:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

The definitive words "produced, manufactured, mined, handled, or in any other manner worked on in any State," standing alone, would require physical contact with the goods. The description of employees engaged in production is stated subordinately to these definitive words. The descriptive phrase "or in any process or occupation necessary to the production thereof, in any State" must be construed in the light of the definition of "produced" and the constitutional limitation on the authority of Congress under the commerce power.

The United States Supreme Court has said Congress may regulate intrastate business only if it "is so directly and immediately connected with such busi-

ness (interstate business) as substantially to form a part or necessary incident thereof." *New York Central R. R. Co. v. Carr*, 238 U.S. 260. This rule has been affirmed in the most recent decisions of the United States Supreme Court.

> *U. S. v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. ....., 132 A.L.R. 1430;
>
> *Consolidated Edison Co. et al. v. N.L.R.B. et al.*, 305 U.S. 197, 222, 82 L. Ed. 126;
>
> *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, 466;
>
> *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 81 L. Ed. 601, 57 S. Ct. 615.

The Supreme Court in the *Jones & Laughlin Steel Corporation* case said (p. 624):

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."

The rule of these recent decisions conclusively shows the necessity of limiting the scope and coverage of the Act. The intent of Congress to adhere

strictly to this principle is evidenced by the definitive words of Section 3 (j), and due regard must be given to the rule of constitutional law and the congressional intent in defining the meaning of "necessary to production."

When "necessary" is used in a statute, the courts have attributed a flexible meaning to it. It is said to express a degree of relationship. As used in Section 3 (j) of the Fair Labor Standards Act of 1938, "necessary" therefore means a degree of relationship to production.

The United States Supreme Court has defined that relationship. The language of the Act can be paraphrased to express that degree of relationship more clearly. So paraphrased, it would read as follows:

> Any work or occupation which is so closely, substantially and directly related to production as to form a part or necessary incident of production.

It therefore follows that the work done by an employee to fall within the definition of "produced" (F.L.S.A. of 1938, Sec. 3 (j)) must be work that is within the process of production or so directly related to the process of production as to form a part or indispensable incident thereof.

It is submitted that appellee and his assignors, who were employed in the cookhouse as baker, dishwasher, helper and second cook, were not engaged in the process of production, nor was their work so directly related to the process of production as to form a part or necessary incident thereof. Appellee and his assignors did not manufacture, handle, or in any other manner work on the logs. They prepared and served food to such of appellee's employees as cared to make use of the cookhouse facilities. Indeed, it is difficult to conceive of a more classic example of a business or establishment that provides daily necessities of life to individuals than a restaurant, which, after all, is what a cookhouse is, even though logging jargon requires the use of a more plebeian word.

The argument that cookhouse or restaurant employees are engaged in production or an occupation necessary thereto is, in short, that employees are necessary to produce logs, food is necessary to continued life and strength of employees, and therefore those who prepare and serve the food to employees are engaged in production or work necessary to production. Certainly loggers must eat but by the same logic it could be argued that in order to cook and serve the food, it must be secured from a grocer, who in turn secures it from the farmers, who in turn must

grow it from seeds purchased from the seed store; therefore, the grocer, the farmer and the seed store man are engaged in production because without them food could not be provided to the loggers and the loggers could not fell and buck logs without food.

No decision that has been cited, or that could be cited, has ever extended the concept of interstate commerce to this length. Indeed, such a holding would "effectually obliterate a distinction between what is national and what is local and create a completely centralized government." The United States Supreme Court in the *Jones & Laughlin Steel Corporation* case said this could not be done in the light of our dual system of government.

The distinction must be drawn between that which may be necessary to the operation of a business in all its phases and that which is necessary to production. The coverage of the Act is limited to work which is a part of production. Providing necessities of life to employees is not directly related to production. This is particularly true where the employees are free to use or not to use the facilities for securing these necessities which are made available to them by the employer.

Ownership, control or management of the cookhouse by the employer is not the test. If the cookhouse were independently owned and operated, it could not be successfully contended that its employees were engaged in commerce nor in the production of goods for commerce because its patrons earned their living and supported their families by working for an employer whose goods or a portion thereof ultimately moved in interstate commerce. If the employees of an independently owned restaurant or cookhouse whose patrons earn their living by working for an employer whose goods move in interstate commerce are held to be covered by the Wage and Hour Law, the distinction between what is local and what is national is completely obliterated. The result is shocking. A completely centralized federal government is established. This must not be done. Yet, if the cookhouse owned by the employer who is also engaged in the business of producing goods for commerce is held to be covered and the independently owned cookhouse or restaurant is held not to be covered, then the test necessarily applied to reach this conclusion is the test of ownership of the cookhouse or restaurant. The language of Section 6 (a) and Section 7 (a) of the Fair Labor Standards Act of 1938 precludes the using of this test.

The cookhouse or restaurant is an adjunct to the principal business of logging. It is operated as a convenience to the employees. It is operated on a non-profit basis. Salaries and wages paid cookhouse or bunkhouse employees do not represent a cost of production. It cannot be said that an employee whose wages are not a part of the cost of production is engaged in production.

The court below relied on *Philadelphia, Baltimore & Washington Railroad Co. v. Smith*, 250 U. S. 101, 39 S. Ct. 396. This was a decision of the Supreme Court of the United States holding that a cook in a railroad camp car was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. In that case plaintiff was cook for a gang of railroad bridge carpenters employed in repairing a bridge which, in itself, was an instrumentality of interstate commerce. The Supreme Court held:

> ". . . it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? *It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly*

have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had. . . . The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, . . . Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act." (Italics supplied.)

The cook in the camp car was employed by a common carrier. The car was operated over the lines of an interstate carrier. The bridge gang worked at various points along the lines of the interstate carrier. The bridge gang had no permanent place of work. When working at remote points the railroad company, in order to carry on maintenance and repair work efficiently, provided a camp car. At the time of the injury suffered by this cook the bridge gang was working at a point remote from other eating and lodging facilities. In the circumstances, the work of the

cook on the camp car was necessary to, and was a part of, the work of the bridge crew.

The case of *Philadelphia, Baltimore & Washington Railroad Co. v. Smith,* supra, is distinguishable on the facts from the case involving logging camp cookhouse employees. The logging camp cookhouse comes within the exception stated by the court in the *Smith* case, to wit:

> "It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work."

The loggers have a permanent place of employment. They are not required to use the cookhouse facilities; indeed, many do not. It is practical and possible for many to commute between their homes or other places affording lodging and boarding facilities and their work. The cookhouse is not maintained, as the United States Supreme Court said in the *Smith* case, "with the necessary effect of forwarding" the work of the loggers. It was maintained as a matter of convenience to the employees of appellant who cared to make use of its facilities. Obviously, restaurants independently owned could not, and would not, follow

bridge gangs from place to place on the lines of an interstate carrier if that carrier did not provide board and lodging facilities. On the other hand, an independently owned restaurant might well be opened at or near a logging camp employing, as appellant does here, several hundred men, if the logging company did not provide board and lodging facilities for the convenience of its employees.

The Glenwood cookhouse (involved in the cross-appeal) was located at a distance from the actual logging operations and used by well under half of appellant's employees, and was used by many who were not employees of appellant at all. It is submitted that in those circumstances these cookhouse employees bore no more intimate relation to the work of appellant's other employees than would the employees of any privately owned restaurant or boarding house which those employees might have used, and, indeed, which they have used since the Glenwood cookhouse was turned over to an independent entrepreneur. Appellant was, in effect, operating a restaurant at Glenwood, as it might have operated a grocery store or (as has been done) a school for the loggers' children. No doubt it was a facility provided for the *convenience* of appellant's employees, but their use of that facility was not required nor was it necessary, as is demon-

strated by the fact that in a typical month only 92 loggers out of close to 300 employed by appellant used those facilities. It is submitted, therefore, that as to the cookhouse at Glenwood, the work carried on there did not in any respect constitute the production of goods for commerce.

The cookhouse at Camp 2, while situated 17 miles from Glenwood and used by substantially all of appellant's employees, was not the only practical facility available to loggers employed at Camp 2. There was and is another independently owned restaurant or cookhouse, about 2 miles from appellant's Camp 2, to which anyone at the camp could go. Furthermore, appellant's employees were free to, and some occasionally did, go back to Glenwood, 17 miles away, for their meals. Appellant's cookhouse at Camp 2 was also used by employees of independent contractors and such members of the general public who come to Camp 2. Furthermore, any employee who preferred to cook his own food was free to do so.

It is submitted that in this case the cookhouse employees were not a part of the logging crew and "actually assisting" them in their work. In view of the factual differences between the *Smith* case and this case we further submit that the decision in the *Smith* case is not controlling here.

It is submitted, therefore, that the employees here in question were not engaged in the production of goods for commerce as that phrase is used in Section 7 (a) of the Fair Labor Standards Act.

II.

Employees in a logging camp cookhouse are exempt from the provisions of Section 7 (a) of the Act because said employees are engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce as provided by Section 13 (a) (2) of the Act.

The exemption provided for in Section 13 (a) (2) of the Fair Labor Standards Act is applicable to logging camp cookhouse employees. Section 13 (a) provides, so far as here relevant, as follows:

> "The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . ."

To determine whether or not the employees here in question fall within this exemption, three tests must be satisfied. (1) They must be engaged in some *retail* or *service* trade, (2) they must be employed in an *establishment*, and (3) the greater part of their work must be in *intrastate commerce*.

We shall therefore examine each of these three prerequisites to determine whether or not appellee and his assignors fall within it.

1. A logging camp cookhouse is a retail or service concern.

A restaurant is almost the classic example of a service establishment, for what is sold is not only food, but the service of food and the use of facilities for eating. Thus, in *City and County of San Francisco v. Larsen*, 165 Cal. 179, 131 Pac. 366, a restaurant was held not to be exempt from a license ordinance containing a clause exempting any person "who sells or manufactures goods, wares and merchandise." The restaurant argued in this case that it was selling food, but the court said:

> "A restaurant keeper is not, according to ordinary usage, either a merchant or a manufacturer. The fact is that both the sale and the manufacture of food are mere minor incidents to the keeping of a restaurant. A restaurant is, primarily, a public eating place."

The Administrator of the Act has consistently so ruled. We quote from Interpretative Bulletin No. 6 issued by the Administrator in June, 1941, but the language which we quote was also included in the Interpretative Bulletin issued in December, 1938:

"22. The term 'service establishment' as used in section 13 (a) (2) may be considered to include generally that large miscellaneous assortment of business enterprises which are similar in character to retail establishments, but which may not be accurately classified as such. . . .

"23. . . . Service establishments are usually local in character, are usually open to the general consuming public and usually render a service to private individuals for direct consumption. The service is usually purchased in small quantities for private use rather than for industrial and business purposes. Further, the service is usually rendered at a 'retail' price.

"24. Typical examples of service establishments akin to retail establishments, within the meaning of the exemption are: Restaurants; cafeterias; roadside diners; hotels; . . . These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise."

This point, however, need be labored no further for if a restaurant (and a cookhouse is the same thing) is not a service establishment it must be a retail "establishment" for it sells its food and service to the ultimate consumer.

2. A logging camp cookhouse is an establishment.

The word "establishment" is defined in Webster's Unabridged Dictionary, Second Edition, as:

> "1. Act of establishing, or state or fact of being established; . . .
>
> 2. That which is established; . . . d *The place where one is permanently fixed for residence or business;* residence, including grounds, furniture, equipage, retinue, etc., with which one is fitted out; *also, an institution or place of business, with its fixtures and organized staff*; . . ."
> (Italics supplied.)

Judicially, "establishment" has been held to mean a permanent place where business is conducted. See *Lilley v. Eberhardt* (Mo.), 37 S. W. (2d) 599; *Veazey Drug Co. et al. v. Bruza et al.*, 169 Okla. 418, 37 P. (2d) 294; *McNabb v. Clear Springs Water Co.*, 239 Pa. 502, 87 Atl. 55; 15 Words & Phrases, Perm. Ed., p. 177 et seq.

The Interpretative Bulletins issued by the Administrator have accepted this definition, and we quote again from Interpretative Bulletin No. 6:

> "33. . . . The word 'establishment' as used in section 13 (a) (2) ordinarily means a physical place of business. . . .
>
> "34. The term 'establishment' is not synonymous with the words 'business' or 'enterprise' as applied to multi-unit companies. Thus, for

example, a manufacturing company which has its own retail outlets operates a number of separate and different types of establishments. Each physically separated place of business must be considered as a separate establishment, and the applicability of the exemption depends upon whether the particular establishment possesses the characteristics of a retail or service establishment."

It was contended in the court below that to hold that a cookhouse was an establishment would be holding, in substance, that the employer was engaged in the restaurant business as well as the logging business, but there could be nothing anomalous in so holding. Most business enterprises are engaged in more than one business and there is nothing unusual or peculiar in finding that a logging company is also engaged in running a restaurant. Many logging companies not only run restaurants, but also run hotels for the general public, gasoline stations, power companies, schools, churches, and numerous other things.

3. The work in a logging camp cookhouse is intrastate in character.

Obviously, the food served in a cookhouse such as that operated by the appellant is made, consumed and served in the cookhouse and there is no interstate flavor, as it were, to the service. No element of the

work done, or the service performed, or the sales made, in appellant's cookhouses took place outside the State of Oregon, or, indeed, outside two counties in Oregon. Once more we refer to Interpretative Bulletin No. 6, where in discussing the "intrastate commerce requirements" of this particular provision, the Administrator has said:

> "45. Selling or servicing is in intrastate commerce if no element of the particular transaction takes place outside the state in which the establishment is located. . . ."

It is submitted, therefore, that a logging camp cookhouse is a service establishment the greater part of whose selling or servicing is in intrastate commerce, and that its employees are therefore exempt from the provisions of the Act.

The court below, in considering this question, used language on which we cannot improve and therefore must quote:

> "There are several factors pertinent to each of these establishments. A cookhouse is a restaurant or roadside diner and, therefore, a typical service establishment. A service was rendered in a physically separate establishment where meals were sold at retail to, and the facilities of the establishment were placed at the disposal of, private individuals for direct consumption and use. Persons

not in the employment of defendant or companies under contract with defendant were served upon the same terms as persons so employed, except that the price was higher for the former. Employees of logging companies under contract with defendant were served. There was no requirement that defendant's employees patronize either cookhouse. Those employees who were served in the cookhouse were charged a price for the meals eaten, which in the aggregate sustained the establishment but was not above cost. These payments were deducted from the employees' wages.

"Obviously, if either of these cookhouses were operated by an entirely independent concern, it would be designated as a restaurant and would fall in the class of a retail or service establishment. Such a restaurant would do the majority of its selling or servicing in intrastate commerce, irrespective of the fact that meals were sold to the employees of one company only. This factor highlights a fundamental problem. The timber worker is a member of the public. As to meals, he is himself a consumer and purchases food at retail as any other member of the consuming public. This is true whether he is employed or unemployed. The fundamental characteristic of a restaurant is sale at retail to the ultimate consumer in intrastate commerce.

"But in this case one circumstance should establish the cookhouses as service establishments. The employees in the woods and the union stipu-

> lated that these should be operated at cost and should be self-sustaining. Clearly, the employees actually producing goods for commerce recognize thereby that the cookhouses are maintained for their service and convenience. Under this clause, the burden of any increased wages to cookhouse employees would fall upon those who were engaged in producing goods for commerce. The latter are not required to patronize the cookhouse but it is there for their service if they so desire." (Tr. pp. 64, 65.)

But the court below, feeling bound by the rulings of the Administrator set forth in the revised issue of Interpretative Bulletin No. 6, held that the Glenwood cookhouse (involved in the cross-appeal) would fall within the exemption, but that the Camp 2 cookhouse (involved in this appeal) would not. We must, therefore, now consider the two cookhouses separately and consider further the effect of the Interpretative Bulletin.

4. The Camp 2 cookhouse.

The Camp 2 cookhouse (involved in this appeal) was isolated and it was, for practical purposes, the only means for the employees to eat at Camp 2.

From these facts it has been urged, first, that the Camp 2 cookhouse was necessary for the production of goods for commerce and that the work in the cook-

house constituted production of goods for commerce under Section 7 (a) and, second, that therefore such work could not be exempt under Section 13 (a) (2). This argument, it is submitted (and it is the argument embodied in the reissue of Interpretative Bulletin No. 6 which we will discuss hereafter), goes too far.

Sections 6 and 7 (the minimum wage and maximum hour provisions) of the Fair Labor Standards Act apply to all employees engaged in commerce or in the production of goods for commerce. Section 13 (a) (2) exempts from Sections 6 and 7 such employees as are engaged in service establishments the greater part of whose selling or servicing is in intrastate commerce. Necessarily, therefore, Section 13 (a) (2) exempts from Sections 6 and 7 certain employees who are in fact engaged in the production of goods for commerce. Otherwise there can be no meaning to Section 13 (a) (2), for if Section 13 (a) (2) does not apply to persons engaged in the production of goods for commerce, it does not apply to anyone. This is recognized by Interpretative Bulletin No. 6, wherein it is said:

> "4. . . . Unless an employee is engaged in interstate commerce or in the production of goods for interstate commerce, sections 6 and 7 are not applicable and accordingly it becomes un-

necessary to ascertain whether section 13 (a) (2) affords an exemption. . . ."

It follows, we submit, that the fact—if it be a fact—that the work performed by cookhouse employees at Camp 2 was necessary to the production of goods for commerce provides no grounds for holding that the exemption is not applicable.

This logically brings us to a discussion of the rulings of the Administrator which the court below found binding. The present ruling of the Administrator applicable to this situation is as follows (Interpretative Bulletin No. 6, p. 12):

> "40. On the other hand, in many cases, section 13 (a) (2) does not apply since the facilities furnished serve merely to facilitate or make possible the continued operation of the principal business of the company. In these cases the employer does not operate an adjunct which is unrelated to the principal business but the furnishing of the facilities is an integral part of the principal operations. The employer does not satisfy the wants of the employees as part of the general consuming public. Deductions for these facilities are normally made from the cash wages received by the employee. The facilities are not made available to the general public. In these cases, there will not be a separate retail or service establishment within the exemption. Thus, for example, isolated lumber and mining camps oper-

ate cookhouses and bunkhouses for employees. These cookhouses and bunkhouses do not serve the general public but are an integral part of the lumber or mining operations. Frequently, deductions are made from the wages of employees for the facilities furnished. The cookhouses and bunkhouses are not adjuncts which are unrelated to the business of lumber or mining. They are as much a part of the principal business as the tool sheds. Failure to provide the facilities would make continued operations difficult. Further, the furnishing of such facilities is not carried on in the same manner as the operations of commonly recognized retail or service establishments. In our opinion, therefore, cookhouses and bunkhouses may not be considered as separate retail or service establishments for purposes of the exemption. Similarly, employees working on a traveling commissary or camp car which goes along with the working construction crew on a railroad or telegraph right-of-way are not engaged in a retail or service establishment for purposes of the exemption. No distinction can be drawn between the employee who sharpens the tools for the men in the gang and the employee who cooks their meals, washes their dishes, or makes their beds."

Under the language of the paragraph we have just quoted, there can be no question but that the work in the Camp 2 cookhouse is not within the exemption provided by Section 13 (a) (2), but we submit that the language of paragraph 40 which we have quoted is

not binding on the court and does not correctly state the law.

First, as to the binding effect of the regulations, we submit that the court below has erred in holding that the ruling embodied in the quoted paragraph was "a permissible one under the language of the statute." The function and the effect of these Interpretative Bulletins issued by the Administrator under the Fair Labor Standards Act are not subjects of doubt. They are certainly entitled to weight and to the consideration of the court, but with equal certainty they do not have the force of law and are not binding on the court.

The Supreme Court of the United States has said of the Interpretative Bulletins issued by the Administrator of the Wage and Hour Division that:

> ". . . In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new. . . .'" *U. S. v. American Trucking Ass'ns.*, 310 U. S. 534, 549, 60 S. Ct. 1059, 1067.

To the same general effect see *U. S. v. Jackson*, 280 U. S. 183, 50 S. Ct. 143; *Maryland Casualty Co. v. U. S.*, 251 U. S. 342, 40 S. Ct. 155.

But it has never been suggested by any court that the Interpretative Bulletins issued by the Administrator are binding, and that is recognized in Interpretative Bulletin No. 6 itself, where it is stated (par. 2):

> ". . . This bulletin is merely intended to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties until he is directed otherwise by the authoritative ruling of the courts or until he shall subsequently decide that his prior interpretation is incorrect."

In considering the weight that should be given to paragraph 40 of Interpretative Bulletin No. 6, attention should be called to the fact that the Administrator has changed his ruling on two different occasions on this very subject. The original ruling (3 Wage and Hour Reporter 363) was that employees in an isolated logging camp cookhouse were not within the exemption, and later the Administrator ruled that such employees, and employees in similar situations, were exempt. (See the letter of Administrator Fleming, dated August 8, 1940, Tr. p. 36, and the letter of Assistant Solicitor Poole, dated August 10, 1940, Tr. p. 43; see also 2 C. C. H. Labor Law Serv-

ice, pars. 25551.61, 25551.6111 and 25551.612.) And, finally, the Administrator's present ruling quoted above is that they are not exempt. The Fair Labor Standards Act has not been amended. The Administrator reserves the right to change his rulings at any time and it certainly can not be suggested, as the court below seems to suggest, that those rulings at any time will be binding and have the force of law simply because they are within the permissible scope of what the Administrator might reasonably determine from the facts. The reasoning of the court below would have required a decision in favor of appellant on this point had the decision been rendered prior to the reissuance of Interpretative Bulletin No. 6 in June, 1941, and a change of that decision afterwards, although the law was the same and the facts were the same and only the Administrator's mind had changed. The Administrator cannot change the law by changing his mind and, whatever the law is, that it has been since the Act was enacted.

Indeed, we may point out that if an interpretation of the Administrator is entitled to great weight, as it is, then this principle is applicable to each of the conflicting interpretations, and there is no reason known to us why the latest interpretation should be entitled to greater weight than the earlier one.

Concededly, however, the opinions of the Administrator are entitled to weight no matter how many times he changes them, but we submit that the weight to which they are entitled becomes less with each change of mind. In the final analysis, the rulings of the Administrator must stand or fall on their own merits.

Therefore, we will now proceed to discuss the ruling embodied in paragraph 40 on its merits. The argument embodied in paragraph 40 of Interpretative Bulletin No. 6 is, in substance, that where the cookhouse or other facilities are operated as an adjunct (or, as one might say, as a convenience) to the principal business of the employer, they may be considered as falling within the exemption, but where the facilities are operated as an integral part of the business of the employer (or, as one might say, as a necessity) they are not exempt. With due deference, it seems to us that this line of reasoning is tantamount to holding that if an employee of such an establishment is engaged in the production of goods for commerce, he does not come within the exemption clause, which renders the exemption clause utterly meaningless.

If a restaurant is a service establishment—and the Administrator concedes that it is—it does not become

less a service establishment by becoming isolated, nor does it become less a service establishment because it is necessary for the carrying on of some other business. After all, all men must eat somewhere and we can find no justification, either in the language of the Act or in the spirit of the Act, for making isolation and necessity the test of whether it does or does not apply. We submit that enforcement of the Act would become extremely difficult and, indeed, the exemption rendered practically nugatory if such amorphous tests are to be used.

A "parade of horribles" is perhaps a faulty method of argument, but it is useful to illustrate the pitfalls into which the use of such tests would inevitably lead. Suppose that in the vicinity of the Camp 2 cookhouse there were two or three independently operated restaurants, indistinguishable from restaurants located in any other place. Not one of these restaurants could be considered as necessary to the prosecution of the work. However, the three of them together would certainly be so considered for without eating facilities the operations could not be carried on. The test of isolation would be applicable to each were it not for the other two, and so would the test of necessity. Under the Interpretative Bulletin as it now stands, such operations would be within the exemption clause of Sec-

tion 13 (a) (2), but would not be so exempted if two of the three restaurants shut down.

If a logging camp cookhouse is a service establishment (and we think it has conclusively been shown to be such), the fact that it is isolated, or the fact that it is necessary to the carrying on of the business, can make it no less so. Particularly is this true if we start with the assumption, as we must, that the exemption provision applies only to employees who are engaged in the production of goods for commerce. If the work in the cookhouse was simply an "adjunct" or a convenience rather than a necessity, the employees would not be engaged in the production of goods for commerce at all under Section 7, and Section 13 (a) (2) does not come into play until it is found that such work is necessary for the production of goods for commerce.

We submit, therefore, that in paragraph 40 of Interpretative Bulletin No. 6 the Administrator of the Act has fallen into a logical error, for while admitting in paragraph 4 of the Bulletin that the exemption in Section 13 (a) (2) applies only to those engaged in the production of goods for commerce within Section 7, he argues in paragraph 40 that because the work performed by the employees in question was necessary for the production of goods for commerce, it is an

integral part of the employer's business and within Section 7, and that therefore the exemption does not apply.

Indeed, with respect to paragraph 40, we can do no better than to quote the criticisms made of the Administrator's ruling by the court below:

> "The interpretation is subject to criticism on several bases. First, a service establishment does not change its character even if it is in an isolated spot and of great practical convenience to the employer. Second, the employees of defendant and employees of companies under contract with defendant are the 'general public' here, purchasing goods and service at retail, even though the price is deducted from their wages. Third, the skilled workers producing goods for commerce are subjected to a greater burden than they would be if working in a settled community, since the cookhouse is to be self-sustaining for the benefit of workers. Fourth, if the employer were to allow an independently controlled establishment to operate a cookhouse here, the skilled worker would pay retail prices at a higher scale and could not longer exercise an influence on the conduct of the cookhouse. Fifth, the policy should be to encourage employers to operate service establishments, such as gasoline filling stations, swimming pools and beauty parlors at cost to the employees, in order to increase the satisfaction of employees at isolated camps and assist in producing goods for commerce.

> "Influenced by such considerations, the Administrator has previously taken an opposite position. During the pendency of this case and owing apparently to developments in this controversy, the former ruling was repudiated, notwithstanding the fact that certain courts had made the previous pronouncement the basis for decision. Labates vs. The Interstate Company, opinion January 29, 1941, Western District Tennessee, Western Division." (Tr. pp. 58, 69.)

We submit that the reasoning of the District Judge is sound and requires a reversal of the ruling of the Administrator in this regard, but the District Judge, while feeling that the Administrator was wrong, curiously decided, in effect, that he was "permissibly" wrong. But there is no area of permissible error allowed to an administrative official in interpreting a statute. The Administrator's opinion must be, and should be, given great weight. The detailed consideration given to it by the District Judge shows that he gave it great weight, but if that ruling seems, as it seemed to the District Judge, to be an incorrect ruling under the law as it stands, then it should not be followed.

The cogent criticisms of the District Judge with respect to the ruling of the Administrator are, we believe, unanswerable and he should have refused and

this court should therefore refuse to be bound by the Administrator's ruling after having given to it the weighty consideration which it deserves.

The employees of a logging camp cookhouse are employed in a service establishment the greater part of whose service is in intrastate commerce. The establishment is no less a service establishment and the service they perform is no less intrastate in character because without it an interstate enterprise would have difficulty in running.

It is respectfully submitted, therefore, that the trial court erred in holding that the employees in the Camp 2 cookhouse were not exempt under Section 13 (a) (2) of the Act and that his ruling in this regard should be reversed.

5. The Glenwood cookhouse.

The Glenwood cookhouse (involved in the cross-appeal), as the undisputed facts show, was not an isolated cookhouse. It was used by less than half of appellant's employees. Most of its use was by employees of independent companies with contractual relations with appellant, but a substantial part of its use was by members of the public. There are other eating facilities in and near Glenwood. The Glenwood cookhouse

was at one time operated and is now being operated as an independent enterprise (Tr. pp. 98, 99).

Because the Glenwood cookhouse is not isolated, and because it is used to a substantial extent by the public and by others than employees of appellant, paragraph 40 of Interpretative Bulletin No. 6 is not applicable, but paragraph 39 of Interpretative Bulletin No. 6 is applicable. We quote:

> "39. Many concerns provide facilities for their employees. In some cases a company operates in its factory a cafeteria or store which is physically separated from the remainder of the plant and is conducted in the same manner as commonly recognized retail or service establishments which are not affiliated with the company. In these cases, the goods or services are sold for cash to the employees, and the store is normally open to the general consuming public. The employer caters to the needs and wants of the employees viewed as part of the general consuming public and not merely as employees. Thus, a company may sell at regular retail prices a general line of merchandise such as clothing, athletic equipment, etc., to its employees in the same manner as independent merchants. In our opinion such a physically separated place of business may be considered as a retail or service establishment separate and distinct from the nonretail plant of the employer."

At this point we must confess to difficulty in finding the distinction that divides the company restaurant or cookhouse held exempt in paragraph 39 from that held not to be exempt in paragraph 40, except to the extent that the paragraph 39 cookhouse, as it were, is patently a convenience to employees rather than a necessity. But, assuming that the distinction is valid, there can be no dispute that the Glenwood cookhouse falls under paragraph 39.

Utterly aside from the regulations as they now stand, it must be obvious that the employees at the Glenwood cookhouse were engaged in a service establishment the greater part of whose service was in intrastate commerce, and that they are therefore exempt from the provisions of Sections 6 and 7 of the Fair Labor Standards Act. The evidence is clear that this cookhouse was not an integral part of appellant's main business, and the evidence is also clear that the operation of the Glenwood cookhouse was in no sense necessary to the carrying on of its logging operations. Most of appellant's employees lived at their own homes or boarded in the vicinity and did not use the cookhouse at all. All readily could have done so, though it would have been less convenient. There was a lunch counter or restaurant in the village which was available to the employees and, as the District

Judge pointed out, it could have been expanded at any time to take care of all of them. The cookhouse had previously been operated as an independent business and appellant had assumed its operation only at the request of the union because the union thought that the rates were too high. Since the complaint was filed in this case the cookhouse at Glenwood has again been leased to an outsider and is being carried on as an independent enterprise.

Furthermore, in an average month over three hundred meals were sold to members of the public, an average of about ten a day. The facilities of the cookhouse were availed of by the unmarried employees of mills in Glenwood with which appellant had no connection and by the employees of logging companies who were doing work under contract with appellant. This use by others than the employees of appellant far exceeded the use by appellant's employees.

The operation of the Glenwood cookhouse admittedly was a convenience. The employees who used it regularly were presumably unmarried men or men who maintained homes at such a distance from Glenwood that they did not care to try to go back and forth every day. Had the Glenwood cookhouse not been operated, these employees would have had to

make less convenient arrangements or, in the alternative, appellant would have had to employ other loggers who lived in the vicinity and who could take care of their own meals without inconvenience. As the testimony of Mr. Crosby shows (Tr. pp. 97, 98), there was never a time that appellant could not have operated without the Glenwood cookhouse, but it preferred to run the cookhouse, not because it could not get employees without a cookhouse, but because it was the best way to retain some employees appellant desired to retain.

The Glenwood cookhouse therefore falls into the same category as any other cafeteria or restaurant which a firm runs for the convenience of its employees. The members of the court are familiar with many such instances. Banks, power companies, department stores, and many other large enterprises maintain restaurants and cafeterias primarily for the use of their employees, some of which are not used by the public at all. But in such cases no employee is required to use them, many employees do not use them at all, and there is available across the street, or downstairs even, plenty of other facilities for eating. No one would contend that such a cafeteria or restaurant was an integral part of the banking or telephone business, or

that the business could not be operated just as well without it. And that is the case here.

It is respectfully submitted, therefore, that the court below did not err in holding that the employees of the Glenwood cookhouse were exempt under Section 13 (a) (2) of the Fair Labor Standards Act, and that appellee therefore cannot prevail on the cross-appeal.

6. The authorities.

Although there have been a fair number of decisions relating to the scope of the exemption granted by Section 13 (a) (2) of the Fair Labor Standards Act, no decision of any appellate court so far rendered throws any light on the problem which confronts this court on the appeal and the cross-appeal. Decisions involving watchmen, of which there have been several (decided both ways), and decisions involving the moot question as to whether employees of loft buildings do or do not fall within the exemption, are of but limited use to the court here, and that is true of most of the other decisions involving the exemption. The factors requiring consideration here differ to a very substantial degree from the factors which require consideration in the ordinary question of whether a concern is a retail or service establishment. This is evi-

denced by the fact that such cookhouses as are here involved are given separate treatment in the Interpretative Bulletins.

A few decisions rendered by nisi prius courts are, however, more or less directly in point and tend to sustain the position for which we are here contending.

Thus, in *Rivera v. Central Aguirre Sugar Company* (D.C., Porto Rico, 1941), 4 Wage and Hour Reporter 272, 4 C. C. H. Labor Cases, par. 60526, the court had before it a substantially analogous problem. There the Sugar Company maintained a hotel, a golf course and a swimming pool, used by both defendant's employees and the general public. The court held that such employees were not engaged in the production of goods for commerce. In *Labates v. The Interstate Company* (W. D. Tenn.), 4 Wage and Hour Reporter 91, 1 P. H. Labor Service, par. 11977 (for Findings of Fact and Conclusions of Law, see 3 C. C. H. Labor Cases, par. 60331), the court held that employees in a railroad restaurant used by railroad employees, passengers and members of the public, were within the exemption granted by Section 13 (a) (2). In this case the restaurant was not operated by the railroad company. In *Woolfolk v. Orino* (D. C., Or., 1942), 5 Wage and Hour Reporter 132, the court held that the Act did not apply to a cook employed by a highway

contractor, but in this case the court relied on the fact that the highway contractor was engaged in original construction, which, under *Raymond v. Chicago, M. & St. P. Ry. Co.*, 243 U. S. 43, did not constitute interstate commerce. In *Ikola v. Snoqualmie Falls Lumber Company*, 4 Wage and Hour Reporter 470, the Superior Court for King County, Washington, held that cookhouse employees in logging camps are within the Act, but this case was reversed on appeal (*Ikola v. Snoqualmie Falls Lumber Company*, 112 Wash. Dec. 156, 121 P. (2d) 369) on procedural grounds and will have to be tried again.

As far as we can discover, the foregoing are the only adjudicated cases which throw light on the problem which this appeal and the cross-appeal present to the court. The principles of construction which can be culled from the other decisions under the Wage and Hour Act are principles of general application as to which neither the appeal nor the cross-appeal presents any controversy and the citing of which would not assist the court in the problem before it.

Reference should perhaps be made to *Fleming v. Arsenal Building Corporation*, 125 F. (2d) 278, which is one of the loft building cases taking the minority view that employees of such buildings are

covered by the Fair Labor Standards Act. In discussing the exemption provided by Section 13 (a) (2), the court in that case said:

> "The 'service' being a part of production, the test should be what kind of production it is a part of."

We take this language to mean that if the "service" (here the serving of foods in logging camps) is part of the production of goods for commerce, then the exemption clause is not applicable. But such an interpretation, as we have pointed out before, successfully reads out of the Act entirely the exemption granted by Section 13 (a) (2). For if the servicing is a part of production, then the exemption would be applicable only if the production were intrastate, and were the production of goods intrastate the Act would not apply anyway. It must be assumed that the framers of the Act intended the exemption to exempt someone, and it can exempt no one if the test used is that adopted by the court in the *Arsenal* case.

7. Conclusion.

This case presents purely a question of statutory construction. The facts are undisputed and the general principles of law applicable to the facts are settled.

We are not unmindful that the Fair Labor Standards Act is a remedial statute and as such should be literally construed, and, similarly, the exemption clause is to be strictly construed under the settled principles of statutory construction. But the exemption clause is not to be construed out of the Act entirely. If it can be given any meaning it must be given meaning in this case.

The problem with which industry is faced in endeavoring to comply with the new standards imposed by this legislation are manifold. But the problems are more or less simple with respect to the vast majority of employees in any enterprise. In any enterprise, however, there are a limited number of employees as to whom the Act creates problems which are vexing, and cooks in logging camps belong to this limited group. These cookhouses are not operated for profit (Tr. p. 34), and in the collective bargaining agreements made between the employers and the unions which represent them, cookhouse employees were excluded from the limitations on hours worked. Both the employers and the unions have therefore explicitly recognized, first, that the cookhouse operation is essentially a service operation and, second, that the cookhouse employees are in a class apart from the other employees. They

must necessarily work at different hours and their work, of course, is of an entirely different nature. In these circumstances, we submit that it is entirely proper that such employees should not be covered by the Act.

And, certainly, as the law was enacted, and as it reads now, cookhouse employees, such as the appellee and his assignors whose work consists solely of serving food, must be regarded as employees of a service establishment the greater part of whose servicing is in intrastate commerce.

Respectfully submitted,

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